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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. [redacted] 776

ROBERT H. CAIN,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE

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OCTOBER TERM, 1959

No. ——

ROBERT H. CAIN,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, ENTERED IN THE ABOVE ENTITLED CAUSE ON FEBRUARY 12, 1960.

OPINION BELOW.

The opinion of the District Court is not reported. The opinion of the Court of Appeals for the Fifth Circuit is not reported. A copy of that opinion is annexed to this petition as Appendix A.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 12, 1960 (R-124). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

QUESTION PRESENTED.

Do private letters which are coarse and abusive constitute the crime of obscenity?

STATUTES INVOLVED.

The statutory provision involved is Section 1461, Title 18 U. S. C. It is printed in Appendix B.

STATEMENT.

Petitioner, Robert Cain, mailed two coarse and abusive letters to his girl friend. He was found guilty by a jury on counts one and three of a four-count indictment of mailing two letters alleged to be "indecent, filthy and vile", in violation of Section 1461, Title 18 U. S. C.[1] Before trial petitioner filed a motion to dismiss the indictment on the ground that the mailing of the letters by defendant did not violate the statute, since the letters were merely coarse and abusive and did not appeal to a prurient interest or sexually stimulate the addressee. The motion to dismiss also charged that the statute violated the First Amendment of the Constitution as a denial of the freedom of speech. Petitioner also charged that the statute does not define the acts it intends to prohibit and, therefore,

[1] The statute in part reads: Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance is declared to be non-mailable matter.

is unconstitutional as violating the Fifth Amendment. These motions were denied, and after trial petitioner was sentenced to one year on each count, the execution suspended. Petitioner appealed to the Court of Appeals for the Fifth Circuit, which court affirmed the conviction.

REASON FOR GRANTING THE WRIT.

1. The statute involved does not apply to private letters unless they are "obscene" as defined by this Court in *Roth v. United States*, 354 U. S. 496.

* * * * * *

In *Roth* this Court addressed itself to a single criterion for non-mailable matter, that which was obscene, Mr. Justice Brennan said:

> "Obscene material is material which deals with sex in a manner appealing to prurient interest." *Roth v. United States*, 354 U. S. 487.

The Court of Appeals for the Fifth Circuit used a different criterion for judging obscenity here, as it felt petitioner was not charged with "obscenity" but specifically as the indictment shows, for mailing an "indecent, filthy, and vile" letter. This was error as this Court and the other circuit courts have held there is but one class of material which is prohibited by Section 1461: the obscene.

In *Swearingen v. United States*, 161 U. S. 446, this Court held that even though the article mailed was coarse and vulgar it was not calculated to debauch the morals of those who might read it, nor could it be considered lewd or obscene.

The opinion of the Court of Appeals clearly is in direct conflict with the Supreme Court in *Roth* and *Swearingen*. There can be no conviction where the letters are merely coarse and abusive and not calculated to induce sexually impure thoughts.

The Court of Appeals said of petitioner's letters:[2]

> "couched in shocking and disgusting language fit for use only in gutters, brothels and like places, the letters villified and defamed . . ." (Appendix A.)

We submit that this is not sufficient to constitute a violation of the statute. A violation can only occur when the material appeals to a prurient interest.

The opinion below not only conflicts with the decision of this Court, but also those of the courts of appeal. In *United States v. Keller*, 259 F. (2d) 54, the Third Circuit held that though the articles mailed were filthy and vile, and the defendant sought to embarrass and humiliate the addressee, the language was not obscene as defined by this Court in *Roth, supra*. In *Keller*, the Court of Appeals for the Third Circuit said:

> "Congress did not intend separate classifications of non-mailable matters for each of these adjectives: 'indecent', 'lewd', 'lascivious' and 'obscene' in Sections 1461 and 1463. Moreover the Supreme Court in Roth addressed itself to a single criterion for the objectionable matter, while the court spoke of 'judging obscenity' the essence of what was said does not permit a less stringent test for judging 'indecent' material."

---

[2] Letters mailed by petitioner reproduced (R. 34-37).

This construction is supported by the doctrine of *ejusdem generis*, whereby general words of description which follow more specific terms are restricted in meaning by those which are more specific. The Fifth Circuit's opinion is in conflict with the Third Circuit. The Third Circuit said the word 'indecent' took its sense and meaning from the associated words in the statute, and thus indecent (like filthy and vile) was limited in its meaning and could be no broader than the definition of "obscenity" as outlined in *Roth, supra.*

Thus the Court of Appeals for the Fifth Circuit has erred in the construction of a federal statute, and that error has resulted in a conflict with previous decisions of this Court, in *Roth* and *Swearingen*, and it conflicts with a decision of another court of appeal, the Third Circuit, in *Keller, supra.*

2. The obscenity statute, Section 1461, Title 18 U. S. C., violates the First and Fifth Amendments of the Constitution of the United States.

Petitioner in the courts below has attacked the constitutionality of the "obscenity statute" on the grounds that it violated the First Amendment by attempting to regulate the freedom of speech, and that it violates the Fifth Amendment by being too vague and incapable of definition.

All speech is not protected. The government has the power to restrict seditious speech directed against it. But it has no such national purpose with respect to protecting itself against pornography, the dangers of federal

censorship as required by this statute violates the First Amendment because it extends the power of the federal government to punish thoughts, where those thoughts have no relationship to anti-social conduct. The federal power should not extend to what the people of this nation think. *Dennis v. United States*, 341 U. S. 494.

The broad interpretation given this statute allows juries censorship powers in making decisions on constitutional questions of free speech.

This has held that the First Amendment does not protect "obscenity" because obscenity does not have any social value. Petitioner contends this Court was in error in so holding.

The statute has in the past been applied too broadly and encompasses things within areas of free speech.

Some obscene writings have been approved because the courts have decided they possess "literary merit". It is submitted that the constitution does not make such a distinction in its mandate that "Congress shall make no law restricting freedom of speech". The courts should not be called upon to decide what writings have literary merit, that duty being left to the critics.

Some writings may instruct or entertain, while others may be nonsense, yet all should be protected by the First Amendment.

The statute violates the Fifth Amendment of the Constitution as it does not define the terms 'obscene', 'lewd',

'lascivious', 'indecent', 'filthy', or 'vile', but leaves it to the courts to supply a definition.

The statute does not advise the public, the prosecutor, judge or jury what conduct is prohibited. A definition is essential to prohibit the Court or jury from acting as the legislature.

The statute, therefore, violates the First and Fifth Amendments of the Constitution and should be declared unconstitutional.

3. The construction and application of the federal obscenity law should be uniformly applied by the courts of this country. Petitioner's conviction results in an improper construction of the statute which will make censors of every federal court. This Court in *One, Inc., v. Olesen*, 355 U. S. 371, reversed the conviction of the publisher of a magazine devoted to promoting an understanding of homosexuality. The magazine contained articles which the Court of Appeals found to be "cheap pornography calculated to promote lesbianism". Certainly the acquittal of defendant there who was engaged in the national smut market is not justified when this defendant remains convicted. Robert Cain is a professional forester, and is not engaged in the selling of cheap literature. This Court also reversed the conviction in *Sunshine Book Co. v. Summerfield*, 355 U. S. 372. There a magazine containing unretouched photographs of nude men and women, and devoted to the cult of nudism, was held to be not obscene. Both convictions were reversed by this Court as being contrary to the decision in *Roth, supra*.

The United States District Court in *Grove Press, Inc., v. Christenberry*, 175 F. Supp. 488, held that the book "Lady Chatterley's Lover" was not obscene because the book had literary merit.

Petitioner submits that the Court of Appeals in this case has misconstrued the statute when publishers of the material in these three cases were acquitted, yet Robert Cain is convicted for mailing two coarse letters. The material in the three cases cited will be circulated millions of times throughout the country, while defendant's letters were only seen by one girl.

It is respectfully submitted that this construction permits the professional publisher to mail whatever material he can sell, but convicts a private citizen from fussing with his girl friend. This construction should be corrected in order to secure the uniform application of this statute. This issue is important to the nation as it involves a restriction of constitutional liberties, afforded by the First Amendment.

Obscenity laws and their encroachment on freedom of speech are matters of fundamental national rights established by our constitution. It is, therefore, natural that this Court should be insistent upon uniformity throughout this country. The issue here is more important to constitutional and statutory construction than was presented in *Roth, supra*, because here the material does not meet the test of obscenity, as was admitted in *Roth*. The settlement of this issue will be vital to the uniform construction of the federal obscenity statute.

CONCLUSION.

In order to guarantee freedom of speech under our constitution and to safeguard the uniformity of the construction of the federal obscenity statute, this petition for a writ of certiorari should be granted.

Respectfully submitted,

/s Grove Stafford

GROVE STAFFORD,
628 Murray Street,
Alexandria, Louisiana,
Counsel for Petitioner.

CERTIFICATE.

I certify that a copy of this petition for writ of certiorari has been served upon counsel for respondent, T. Fitzhugh Wilson, United States District Attorney, by depositing a copy of same in the United States mail, addressed to him at his office in the Federal Building, Shreveport, Louisiana, and to Mr. J. Lee Rankin, the Solicitor General of the United States, by depositing a copy of same in the United States air mail addressed to him at the office of the Solicitor General, Department of Justice, Washington 25, D. C., prior to filing in this Court.

Alexandria, La., this 8th day of March, 1960.

/s Grove Stafford

GROVE STAFFORD

APPENDIX "A".

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17954

ROBERT H. CAIN,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

(February 12, 1960.)

Before RIVES, Chief Judge, and HUTCHESON and JONES, Circuit Judges.

HUTCHESON, Circuit Judge: Appellant, defendant below, was found guilty, on each of Counts One and Three of a Four Count Indictment, of sending through the

mails, in violation of 18 U.S.C.A., Sec. 1461, for delivery to the addressee, an indecent, filthy, and vile letter, and not guilty on each of Counts Two and Four, in violation of 18 U.S.C.A., Sec. 876, of depositing for mailing and delivery to the addressee a communication containing a threat to injure the person of the addressee. His motions for acquittal notwithstanding the verdict and in arrest of judgment, on the ground that the mailing of the letters could not, and did not, constitute a crime or offense against the United States Government for the reason that, while the letters did contain coarse, violent and shocking language, they were not indecent, filthy, and vile, as charged, and their sending could not support the conviction, were denied, and he was sentenced to one year on each of the two counts, the sentences to run concurrently, and the execution thereof suspended.

Appealing from the conviction and sentence, defendant is here insisting: that the court committed reversible error (1) in denying his motions for acquittal and in arrest; (2) in refusing to give in charge to the jury defendant's requested charges; (3) in not granting a mistrial because of the district attorney's statement in argument: "I tell you that man is a fiend. He is a man that is not safe to be among ordinary human beings. We don't know what he might do."; and (4) in denying defendant's plea of former jeopardy.

In support of his primary position, appellant asserts that, while the letters were admittedly coarse, vulgar, and shocking, they were not indecent, filthy and vile, in the sense of obscene, as that term is defined and applied

in *Roth v. United States*, 354 U.S. 476, and, therefore, do not violate Section 1461, Title 18.

In further support of his views, he invokes *Su..zr-ingen v. United States*, 161 U.S. 446, a decision under a different statute from that under which this prosecution is brought, and *United States v. Keller*, 259 F(2) 54, a prosecution under Section 1463, for sending postcards through the mails, and three cases dealing with the unsuccessful efforts of the Postmaster General to exclude books or other publications from the mails. The first of these is *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488. In it the district judge gives his imprimatur, as a literary gem, to the publisher's unexpurgated version[1] of Lady Chatterley's Lover. The other two, *One Incorporated v. Olsen*, 355 U.S. 371, and *Sunshine Book Co. v. Summerfield*, 355 U.S. 372, are each one sentence per curiam opinions reversing, on the authority of *Roth v. United States, supra*, the action of the lower courts. Since it is not claimed that the letters in question in this case served any useful purpose or had literary merit, indeed it is conceded that they did not have, it is quite obvious that these three cases are without bearing here and, for the purpose of this opinion, need not be either approved or disapproved by us.

Arguing that the letters are crass expressions of an abusive nature, written in anger, which are so revolt-

[1] A version hailed by its enthusiastic supporters as D. H. Lawrence's "frontal assault on the shaky but still formidable redoubts of Victorian morality", and by its equally enthusiastic detractors as dedicated to glorifying and thus advancing the cause and cult of illicit love for the sake of its illicitness, Cf. "The Lady Chatterley Spectacle", Leo Hamalian, Columbia University Forum, Winter, 1960, Vol. III, No. 1.

ing that they would be more apt to fill this girl friend's heart with hate than lust, indeed so repulsive as to be considered ludicrous, appellant urges upon us, in reliance on Swearingen's case, *supra*, that the conviction cannot be sustained without doing violence to clearly settled principles of law.

On its part, the United States argues that, by any standard of opinion and by any accepted or acceptable definition, the letters, which deal in a shockingly gross and sensual way with sexual matters, are indecent, filthy, and vile, and their deposit in the mails constitutes a crime, in violation of the language of the statute and the basic purpose of Congress, which was to protect the mails from use for just such communications. So arguing, it insists that whether they were written in lust or anger, or whether they did or did not have the effect of exciting lustful thoughts in the person to whom they were addressed, is wholly immaterial.

In support, it relies on *U.S. v. Limbhouse*, 285 U.S. 424, where the defendant was indicted in thirty counts, each charging the mailing of a separate filthy letter, in which the court, with Justice Brandeis as the author, considered and rejected the same contentions which were advanced there as they are here on the authority of the Swearingen case. Saying:

> "The letters contained much foul language; charged the addressee or persons associated with them with sexual immorality, and in some cases charged miscegenation and similar practices. They were coarse, vulgar, disgusting, indecent, and un-

questionably filthy within the popular meaning of that term."

the court then went on to say:

"The indictment here under review contains no reference to 'obscene, lewd, or lascivious'. The charge is of depositing 'a certain filthy letter'. It is brought under the amendment to Sec. 3893 of the Revised Statutes made by Sec. 211 of the Criminal Code * * * which inserted the words, 'and every filthy' * * *. We think that it is a more a natural reading of the clause to hold that by the amendment Congress added a new class of unmailable matter,—the filthy. The letters here in question plainly relate to sexual matters. We have no occasion to consider whether filthy letters of a different character fall within the prohibition of the Act."

So arguing, the district attorney insists that that case rules this one, and the judgment must be affirmed.

We agree. Couched in shocking and disgusting language, fit for use only in gutters, brothels, and like places, the letters vilified, defamed, and, as far as the reading of such language could do it, sought to debase and defile the woman to whom they were addressed. The defendant, their author, thus, by the use of the mails, accomplished in a thorough and effective way his purpose of assaulting the sensibilities, and disturbing the peace of mind, of the recipient, his intended victim. Vile, indecent and filthy, therefore, as they were upon their face,

wholly without regard to whether the effect upon the recipient was or was not the one intended by defendant, their sending violates the prohibitions of the law. While, therefore, we wholly disagree with appellant's claim that the Roth case and the other cases cited by him in effect make such letters mailable and, therefore, license him and others to do what he has done and, if not prevented, might do again—indeed, we think the Roth case is direct authority against him,—we think it too clear for argument that, under the Limehouse case, to which may be added *Verner v. United States* (3 Cir.) 183 F(2) 184, *United States v. Roth*, 237 F(2) at p. 801, *Roth v. United States*, 354 U.S. 281-2, *Kingsley Pictures Corp. v. Regents*, 260 U.S. at page 688, note 10, and *Thomas v. United States*, 262 F(2) 844, to similar effect, defendant's guilt was fully made out.

The defendant's secondary specifications of error are no better taken and may be categorically and briefly disposed of.

His claim of former jeopardy must be rejected out of hand as without basis in fact or in law. This is so because his first conviction on his plea of guilty was set aside at his request on his motions, to withdraw his plea of guilty and for a new trial. Cf. *Pratt v. United States*, 102 F(2) 275 and cases cited.

Of his specification that the Court erred in not arresting the judgment when the United States Attorney called the appellant a fiend in his closing argument, it is sufficient to say that the court, pursuant to defense counsel's opposition, immediately instructed the jury to dis-

regard these remarks, *Hall v. United States*, 171 F(2) 347, *Diggs v. United States*, 220 Fed. 545, *Kowalchuk v. United States*, 176 F(2) 863, *Finley v. United States*, 271 F(2) 777; while the verdict of the jury, acquitting the defendant on counts two and four, charging threats to injure the addressee, is, if such evidence is needed, convincing proof that the remarks, directed as they were, to the counts charging threats of violence, were without adverse effect on the jury.

The claimed error, that the court failed to give appellant's requested charges, is rejected because the court gave a full, careful and fair charge, to which no objections were made except as the requested charges may be so considered, and, in addition, since the charges requested embodied ideas which, as shown above, we have completely rejected, it was not error to refuse them. Indeed it would have been error to have given them in charge.

No reversible error being made to appear, the judgment is AFFIRMED.

APPENDIX "B".

18 *U. S. C.* 1461:

"Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, devise, or substance; and * * *"

* * *

is declared to be non-mailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Whoever knowingly deposits for mailing or delivery, anything declared by this section to be non-mailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1959

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1960. The petition for a writ of certiorari was filed on March 10, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 12541(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1461 renders non-mailable a "filthy and vile" private letter.

2. Whether 18 U.S.C. 1461 violates the guarantees of the First and Fifth Amendments.

STATEMENT

On February 20, 1959, a 4-count indictment was returned in the United States District Court for the Western District of Louisiana charging, in counts 1 and 3, that the petitioner mailed two "indecent, filthy and vile" letters in violation of 18 U.S.C. 1461 to Beverly Robertson, and in counts 2 and 4 that these letters contained threats to injure her person in violation of 18 U.S.C. 876 (R. 1-3). Following a jury trial, the petitioner was convicted on counts 1 and 3, and acquitted on counts 2 and 4 (R. 99-100). He was sentenced to imprisonment for one year on each of counts 1 and 3, to run concurrently. Execution of the prison sentence was suspended and the petitioner was placed on probation for 5 years (R. 107).

The facts are not in dispute: The petitioner testified that he had written and mailed the letters[1] to Beverly Robertson, explaining that they were written in anger (R. 64-65, 67). Postal inspector Harmon D. Newton stated that he had discussed these letters with the petitioner, who voluntarily admitted writing and mailing them (R. 49-52). The petitioner also executed a sworn statement to that effect (R. 53). The addressee testified that she had received them (R. 30-32).

The court of appeals unanimously affirmed the petitioner's conviction (Pet. App. A).

ARGUMENT

1. The petitioner argues that since the letters he mailed were not "obscene" within the meaning given that term in *Roth* v. *United States*, 354 U.S. 476, 487—that is, not "material which deals with sex in a manner

[1] The letters are set forth in the record at R. 34-37.

appealing to prurient interest"—they were not unmailable under 18 U.S.C. 1461.

The complete refutation of this assertion is provided by this Court's decision almost 30 years ago in *United States* v. *Limehouse*, 285 U.S. 424. In that case, the defendant was charged under the predecessor of the present statute with mailing some thirty "filthy" private letters. On the ground that none were "obscene, lewd or lascivious," the district court dismissed the indictment. In reversing, this Court, through Mr. Justice Brandeis, stated (p. 426):

> The indictment here under review contains no reference to "obscene, lewd, or lascivious." The charge is of depositing "a certain filthy letter." It is brought under the amendment to § 3893 of the Revised Statutes made by § 211 of the Criminal Code, Act of March 4, 1909, * * * which inserted the words "and every filthy." Now the clause reads "every obscene, lewd, or lascivious, and every filthy, book, * * * letter."[2]
>
> The lower court failed to recognize that the amendment introduced, not merely a word, but a phrase. Disregarding the collocation of the words, it * * * gave to "filthy" the meaning attributed * * * to the words "obscene, lewd, or lascivious." Thus, the court emptied the amendment of all meaning. We think that it is a more natural reading of the clause to hold that by the amendment Congress added a new class of unmailable matter,—the filthy. * * *

[2] 18 U.S.C. 1461 presently covers "obscene, lewd, lascivious, indecent, filthy or vile" material.

Cf. *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-572.[3]

2. Petitioner's further contention that 18 U.S.C. 1461 violates the First and Fifth Amendments (Pet. 5-7), was recently resolved in favor of constitutionality in the *Roth* case, *supra*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

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Assistant Attorney General.

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JEROME M. FEIT,
Attorneys.

APRIL 1960

[3] The petitioner's reliance (Pet. 4-5) upon *United States* v. *Keller*, 259 F. 2d 54 (C.A. 3) is misplaced since that case involved an indictment under 18 U.S.C. 1463 which does not cover "filthy or vile" material but by express terms deals only with "indecent, lewd, lascivious, or obscene" matter.

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